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IN THE

Supreme Court of the United States

October Term, 1964

No. 315

RESTAURANT LEAGUE OF NEW YORK, INC., SARDI RESTAURANT CORPORATION, 21 CLUB, INC., on behalf of themselves and all other restaurants who are members of the RESTAURANT LEAGUE OF NEW YORK, INC.,

Petitioners,

AGAINST

JACK TOWNSEND, President, and JOSEPH BURKE, Secretary-Treasurer of BARTENDERS UNION OF NEW YORK CITY, LOCAL NO. 15 AFL-CIO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION, FIRST DEPARTMENT

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IN THE

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OCTOBER TERM, 1964

No. .....

RESTAURANT LEAGUE OF NEW YORK, INC., SARDI RESTAURANT CORPORATION, 21 CLUB, INC., on behalf of themselves and all other restaurants who are members of the RESTAURANT LEAGUE OF NEW YORK, INC.,

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JACK TOWNSEND, President, and JOSEPH BURKE, Secretary-Treasurer of BARTENDERS UNION OF NEW YORK CITY, LOCAL No. 15 AFL-CIO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION, FIRST DEPARTMENT

The petitioners, Restaurant League of New York, Inc., Sardi Restaurant Corporation, 21 Club, Inc. acting for themselves, and on behalf of all other members of the Restaurant League of New York, Inc., pray that a writ of certiorari issue to review an order of the Supreme Court of the State of New York, Appellate Division, First Department, dated March 31, 1964, which affirmed an order of the Supreme Court of the State of New York, New York County, entered on February 7th, 1964 and from

which order, leave to appeal to the Court of Appeals of the State of New York was denied by the Court of Appeals by order dated May 7, 1964.

Opinion Below

The order and opinion of the Supreme Court of the State of New York, New York County, has not been reported and is printed in Appendix "A" hereto, pages 14 to 15. The orders of the Appellate Division, First Department and the Court of Appeals are printed in Appendix "A" respectively at pages 16 to 17 and 18.

Jurisdiction

The order of the Supreme Court of the State of New York, New York County, was entered on February 7th, 1964 (Appendix "A", pp. 14-15, *infra*). The order of the Supreme Court, Appellate Division, First Department, State of New York, was entered on March 31st, 1964 (Appendix "A", pp. 16-17, *infra*). A motion for leave to appeal to the Court of Appeals of the State of New York was denied on May 7th, 1964 (Appendix "A", p. 18, *infra*).

The arbitration proceedings have been completed, but by stipulation of the parties the arbitrator is stayed from rendering an award until an application is made to a Justice of this Court for a stay pending consideration of this petition, but in no event later than July 30, 1964. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1257 and Section 2101.

Questions Presented

1. May an issue involving the basic principles of the National Labor Relations Act, as amended (29 U. S. C. Sections 151 *et seq.*) ("Act") which Congress intended to be decided by the National Labor Relations Board ("Board") in aid of a national uniform labor policy, be submitted to an arbitrator for decision when the employer cannot obtain a protective order from the Board to remedy any decision of the arbitrator which may be in conflict with the national labor policy enunciated by the Board and this Honorable Court?

2. May a Union seek to enforce alleged contractual rights in arbitration where a decision by the arbitrator may deprive the employer of the right to collective bargaining where the employer cannot protect his rights by resort to the Board?

Statutes Involved

The statutory provisions involved are the National Labor Relations Act, as amended (28 U. S. C. Sections 151 *et seq.*).

Statement

The Restaurant League of New York, Inc. ("League") is a membership corporation comprised of the major service restaurants in the City of New York. League restaurants employ waiters who are members of Dining Room Employees Union, Local 1 ("Local 1"); chefs cooks and other kitchen employees, who are members of Chefs, Cooks, etc. Local Union 89 ("Local 89"); bartenders who are members of Bartenders Union of New

York City, Local 15 ("Local 15" or "Union") and other categories of employees who are members of other unions.[1]

The members of the League, acting through the League, have negotiated collective bargaining agreements with the above named unions, on an association-wide basis, for approximately 25 years.

The collective bargaining agreement between the League and Local 15 includes a management prerogative clause, a no strike and no lockout clause and a provision requiring the submission of all disputes arising under the agreement to arbitration.[2]

The collective bargaining agreement between the League and Local 15 does not expire until October 31, 1964. However, a collective bargaining agreement between the

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[1] Locals 1, 89 and 15 are sister unions affiliated with the same International and are members of a Joint Executive Board of New York City which establishes policies and coordinates labor actions on their behalf when they are affected by a matter of common interest.

[2] "15 MANAGEMENT

Subject to the provisions of this agreement, the following are exclusively the responsibilities of the employers: To hire, to maintain order and efficiency, to promote, to discipline or discharge for cause, to regulate and control the number of employees necessary for the operation of the employer's businesses, to lay off according to seniority, to direct the working forces and to supervise the duties and starting time of the employees."

"18 NO STRIKE OR LOCKOUT

No strike, stoppage of work, picketing or boycott shall be declared by the Union against any employer, and no employer shall lock out the bartenders during the term of this agreement, provided, however, the Union reserves the right to withdraw its members in the event a *bona fide* picket line is established by a labor organization, and nothing herein shall be construed so as to require a member of the Union to cross a picket line resulting from a *bona fide* dispute."

ARTICLE "22" provides that there shall be submitted to arbitration "All disputes concerning the application, interpretation or construction of this agreement, or any of its terms, conditions or provisions. * * *"

League and its members and Local 1 did expire on October 30, 1963. Prior thereto the parties commenced negotiations for a new collective bargaining agreement, to be effective as of November 1, 1963. The negotiations were prolonged and the waiters continued working during the negotiations and after the labor agreement had terminated. Finally, on December 7, 1963, Local 1 advised the League that unless an agreement was reached, strike action would be taken against its members. On December 7, 1963, Local 1 invoked a strike against three League members and advised that the strike would spread to the other restaurants. The latter met on December 8, 1963 and determined to close their establishments in order to protect their collective bargaining rights and to avoid irreparable losses in the event that a strike ensued. Obviously, Local 1 intended to "whipsaw" the members of the League by striking selected individual members and thereby force the others to sign a new collective bargaining agreement unilaterally imposed by Local 1. This technique was designed to prevent the restaurants from bargaining collectively through the League, as their representative. Hence, the members of the League were compelled to close their establishments to defend against the "divide and conquer" tactic of Local 1 and to minimize losses which would inevitably follow a strike called without prior notice.

The action taken by the League was a defensive response to the Local 1 strike plan. As a consequence, employees who were members of Local 15 and Local 89 were unable to work. On December 12th, 1963, Local 15 filed a demand for arbitration with the American Arbitration Association, alleging that disputes had arisen under the collective bargaining agreement between it and the

League, in that the League and its members had engaged in a lockout.[3]

Simultaneously with the filing of the demand for arbitration, Local 15 also filed unfair labor practice charges with the Board (Case No. 2 CA—9706) alleging, in substance, that the activities of the League as set forth above violated the Act.[4]

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[3] "1. Has the Association and its constituent members terminated the employment of all head bartenders, bartenders, service bartenders and bar boys employed by the members of the Association in breach of the Agreement between the parties, and if so, what shall the remedy be? Has the Association and its constituent members violated the terms of the Agreement between the parties by locking out all head bartenders, bartenders, service bartenders and bar boys without notice or negotiation with the Union, and if so, has the Union and/or its members been damaged thereby and what shall the remedy be?

2. Has the Association and its constituent members varied the terms of the agreement between the parties by locking out all head bartenders, bartenders, service bartenders and bar boys without notice or negotiation with the Union, and if so, has the Union and/or its members been damaged thereby and what shall the remedy be?"

[4] "1) On and after December 9, 1963, the Restaurant League of New York, Inc. and its constituent members locked out and terminated the employment of all head bartenders, bartenders, service bartenders and bar boys solely because of their membership in and representation by the Bartenders Union of New York City, Local 15, AFL-CIO.

2) On and after December 9, 1963, the Restaurant League of New York, Inc., and its constituent members failed to bargain in good faith with the Bartenders Union of New York City, Local 15 AFL-CIO, by taking unilateral action in regard to the employment of all head bartenders, bartenders, service bartenders and bar boys, without notice to or negotiation with the Union, which is the recognized bargaining agent for these employees.

3 By the above and other and further acts, the Restaurant League of New York, Inc., and its constituent members interfered with the right of the said employees to select a union of their own choice as guaranteed by the Act."

A comparison of the issues which Local 15 submitted to arbitration and the charges filed with the Board demonstrates that they are the same and that identical relief might be granted by the Board or the arbitrator, namely, an award of back pay to the bartenders for the time lost.

On January 30, 1963, the Regional Director for the Second Region of the Board approved the voluntary withdrawal of the charges filed by Local 15. Despite the fact that the issues incorporated in the demand for arbitration are those which only the Board may decide, the Courts below determined that the filing of the charges before the Board did not bar Local 15 from seeking arbitration of issues plainly within the exclusive jurisdiction of the Board.

Reasons for Granting the Writ

1. This case involves novel and substantial questions which have not been resolved by this Honorable Court. The decision by the Court below offends against the whole theory of a federal substantive labor law. Concededly, where the same acts may constitute both an unfair labor practice and a breach of a collective bargaining agreement, the parties are not relegated to the processes of the Board, but may seek to enforce their rights in another forum. *Teamsters, Chauffeurs, etc.* v. *Lucas Flour Co.*, 369 U. S. 95 (1962); *Charles Dowd Box Co.* v. *Courtney*, 368 U. S. 502 (1962); *Atkinson* v. *Sinclair Refining Co.*, 370 U. S. 238 (1962); *Textile Workers Union* v. *Lincoln Mills*, 353 U. S. 448 (1957). This was reaffirmed in *Smith* v. *Evening News Asso.*, 371 U. S. 195 (1962), but this Court stated:

> "If, as respondent strongly urges, there are situations in which serious problems will arise from

> both the courts and the Board having jurisdiction over acts which amount to an unfair labor practice, we shall face those cases when they arise" (pp. 197-198).

This is a case posing "serious problems" which this Court should "face" and decide. When so seminal a right as the right to collective bargaining is at issue, only this Court can determine whether resort to arbitration is permissible and whether if an arbitrator's award may defeat the scheme of a uniform national labor policy which Congress has charged the Board with developing, the parties must, nevertheless, arbitrate the dispute.

2. The determination of the rights and liabilities of employers associations and unions in collective bargaining lies within the exclusive and expert judgment of the Board. This was recognized by this Court in the case of *N.L.R.B.* v. *Truck Drivers Union*, 353 U. S. 87 (1957).

In the recent case of *New York Mailers' U. Number Six Inter. Typo. U.* v. *N.L.R.B.*, 327 F. 2d 292 [CA 2. 1964], the Board and the Second Circuit held that an association of employers could lawfully close their plants in defense against strike action taken by a union against an employer-member of an association. The exercise of this statutory right by the association ought not and does not create liability on the part of the employers to the employees of the employers who belong to a neutral, non-striking union. Accordingly, the Board dismissed a complaint filed on behalf of the neutral, non-striking craft union and the Court of Appeals for the Second Circuit affirmed, holding that:

> "The Board's decision in the present case appears to reflect existing industrial realities. Un-

> doubtedly many employers subject to the operation of our national labor laws are engaged in businesses employing workers represented by more than one labor union. Moreover, it would seem that, as with the newspaper industry in New York City, many such industries are highly integrated operations in which a shutdown of one portion of a plant soon results in the entire business coming to a halt. Therefore, to make unlawful a defensive lockout, because it may ultimately result in loss of work for neutral employees in crafts different from that of a striking union would, even in the classic *Buffalo Linen* situation, seriously limits the instances where the defensive lockout could be legitimately used. See *N.L.R.B.* v. *Continental Baking Co.*, 221 F. 2d 427, 437 (27 LC Par. 69, 107) (8 Cir. 1955); *Local 50 Bakery & Confectionery Workers* v. *General Baking Co.*, 97 F. Supp. 73 (S. D. N. Y. 1951)" (p. 300).

Immediately following this decision, the Board's Regional Director, on January 30th, 1964, permitted Local 15 to withdraw the unfair labor practice charges which it had filed. The withdrawal of the charges was obviously prompted by the recognition by Local 15 that the petitioners had acted in accordance with the rights accorded to them under the Act, and that there had been no violation of the Act. Local 15 now seeks to frustrate these rights by pursuing the remedy of arbitration. It is an elementary rule that private contracts cannot vitiate the collective bargaining rights granted to employers under the Act. In the landmark case of *National Licorice Company* v. *National Labor Relations Board*, 309 U. S. 350 (1940), this Court held:

> "* * * It is sufficient to say here that it will not be open to any tribunal to compel the employer to perform the acts, which, even though he has bound himself by contract to do them, would violate the Board's order or be inconsistent with any part of it. Section 10(a) and (c) of the Act commits to the Board the exclusive power to decide whether unfair labor practices have been committed and to determine the action the employer must take to remove or avoid the consequences of his unfair labor practice" (p. 365).

It is equally fundamental that a collective bargaining agreement cannot operate as a waiver of rights granted by the Act. Thus, in *J. I. Case Co.* v. *N.L.R.B.*, 321 U. S. 332 (1944), this Court held:

> "Individual contracts, no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act looking to collective bargaining, nor to exclude the contracting employee from a duly ascertained bargaining unit; nor may they be used to forestall bargaining or to limit or condition the terms of the collective agreement. 'The Board asserts a public right vested in it as a public body, charged in the public interest with the duty of preventing unfair labor practices.' National Licorice Co. v. National Labor Relations Bd., 309 U. S. 350, 364, 84 L. ed. 799, 810, 60 S. Ct. 569. Wherever private contracts conflict with its functions, they obviously must yield or the Act would be reduced to a futility" (p. 337).

The case at bar presents the "serious problems" which arise when a matter which has been reserved for the exclusive jurisdiction of the Board is to be submitted to another forum. In effect, the Board has determined, or, at least, Local 15 has acknowledged that unfair labor practices have not been committed by the petitioners. Since the underlying acts involved in the proceedings before the Board and in the arbitration are one and the same, there can be no valid distinction between public, as distinguished from private rights. Hence, one serious consequence of arbitration may be a subversion of the uniform national labor policy against which the employers cannot seek or obtain a protective order. Arbitration may be a salutary vehicle in labor relations, but it cannot be employed as a weapon to challenge the jurisdiction of the Board and to destroy the uniform national labor policy.

To be sure, in *Carey* v. *Westinghouse Electric Corp.* 375 U. S. 261 (1964), this Court directed the parties to proceed to arbitration even though the underlying situation might ultimately require action by the Board. However, this Court pointed out that in the event the arbitrator's decision was contrary to the law and to the principles enunciated by the Board, the employer would be free to obtain a protective order from the Board:

> "If this is truly a representation case, either IUE or Westinghouse can move to have the certificate clarified, but the existence of a remedy before the Board for an unfair labor practice does not bar individual employees from seeking damages for breach of a collective bargaining agreement in a state court, as we held in *Smith* v. *Evening News Assn.*, 371 U. S. 195. We think the same policy considerations are applicable here; and

> that a suit either in the federal courts, as provided by Section 301(a) of the Labor Management Relations Act of 1947 (61 Stat. 156, 29 U. S. C. Section 185(a); *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448), or before such state tribunals as are authorized to act (*Charles Dowd Box Co.* v. *Courtney*, 368 U. S. 502; *Teamsters Local* v. *Lucas Flour Co.*, 369 U. S. 95) is proper, even though an alternative remedy before the Board is available, which, if invoked by the employer, will protect him" (p. 268).

In the case at bar, there is no procedure by which petitioners can invoke the processes of the Board either for clarification or for a protective order to vindicate its collective bargaining rights. On the contrary, petitioners are exposed to the possibility that the arbitrator may conclude that petitioners are liable in damages even though they acted under, and exercised rights accorded to them by, the Act notwithstanding that these rights cannot be superseded by private contractual arrangements. Rather than uniformity, employers will be exposed to results which are "bound to create the same undesirable confusion, conflicts and burdensome proceedings" that the Act was designed to eliminate. *Smith* case, *supra* (371 U. S. 202).

It is the duty of the courts to expound a body of federal labor law uniformly applicable to the vital field of industrial relations. Only this Court may determine whether a party may engage in forum shopping in the expectation of obtaining a reward when statutory relief is foreclosed. Thus, under the Railway Labor Act (45 U. S. C. Sections 151 *et seq.*) an employee who contests a discharge before an Adjustment Board cannot thereafter relitigate the issues in the Courts [*Union P. R. Co.* v. *Price*, 360 U. S. 601 (1959)]. Precisely such a result

must follow in this case, and even if it be assumed that the Board did not have exclusive jurisdiction and that Local 15 had the option to proceed before the Board or in arbitration, having elected to proceed before the Board, it should not now be permitted to proceed to arbitration.

The novel questions presented by this petition must be resolved by this Court. The importance to employers and unions engaged in association-wide bargaining is self-evident. Among other things, a decision will not only provide guideposts for implementing existing contracts but for the lawful exercise of rights in collective bargaining and the drafting of collective labor agreements.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix "A"

ORDER

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

SPECIAL TERM, PART I

Index Number 179 Year 1964

Present: HON. JOSEPH A. GAVAGAN
Justice

RESTAURANT LEAGUE OF NEW YORK, INC. et al.
Plaintiff

AGAINST

JACK TOWNSEND etc. et ano
Defendant

The following papers numbered 1 to 10 read on this motion, argued this 28th day of January, 1964. Calendar No. 96.

	Papers Numbered
Notice of Motion and Affidavits Petition Annexed and marked Exhibits	1–6
Answering Affidavits answer and exhibit	7–9
Replying Affidavits	10

Upon the foregoing papers this motion to stay arbitration is denied. Whether or not petitioners violated Paragraph 18 of the agreement between the parties presents a dispute embraced within the arbitration provisions of the agreement. In filing a formal complaint with the National Labor Relations Board respecting petitioners' alleged violation of the National Labor Relations Act, respondents in no manner whatsoever abrogated their right to an arbitration of the dispute involved. The parties are directed to proceed to arbitration.

Dated February 6, 1964

/s/ J. A. G.
J. S. C.

Briefs: Respondents' X. Petitioners' X.

AFFIRMANCE OF ORDER

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 31st day of March, 1964.

Present—HON. CHARLES D. BREITEL,
Justice Presiding

" FRANCIS L. VALENTE,)
" SAMUEL W. EAGER,)
" ARON STEUER,)
" EARLE C. BASTOW,)
Justices

7174

In the Matter of the Application

of

RESTAURANT LEAGUE OF NEW YORK, INC., SARDI RESTAURANT CORPORATION, 21 CLUB, INC., on behalf of themselves and all other restaurants who are members of the RESTAURANT LEAGUE OF NEW YORK, INC.,
Petitioners-Appellants,

vs.

JACK TOWNSEND, President and JOSEPH BURKE, Secretary-Treasurer of BARTENDERS UNION OF NEW YORK CITY, LOCAL No. 15, AFL-CIO,
Respondents-Respondents.

An appeal having been taken to this Court by the petitioners-appellants from an order of the Supreme Court, New York County, entered on the 7th day of February, 1964, denying petitioners-appellants' motion to stay an arbitration proceeding between the parties and directed the parties to proceed to arbitration, and said appeal having been argued by Mr. Herbert Burstein, of counsel for the appellants, and by Mr. Harold L. Luxemburg, of counsel for the respondent; and due deliberation having been had thereon,

It is hereby unanimously ordered that the order so appealed from be and the same is hereby affirmed with $20 costs and disbursements to the respondents.

Enter:

s/ VINCENT A. MASSI
Clerk.

ORDER DENYING MOTION FOR LEAVE TO APPEAL

STATE OF NEW YORK,

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Seventh day of May A.D. 1964.

Present, HON. CHARLES S. DESMOND,
Chief Judge, presiding

Mo. No. 389

In the Matter of the Application

of

RESTAURANT LEAGUE OF NEW YORK, INC., &ors, on behalf of themselves and all other restaurants who are members of the RESTAURANT LEAGUE OF NEW YORK, INC.,
Appellants,

vs.

JACK TOWNSEND, President and JOSEPH BURKE, Secretary-Treasurer of BARTENDERS UNION OF NEW YORK CITY, LOCAL 15, AFL-CIO,
Respondents.

A motion for leave to appeal to the Court of Appeals and for a stay in the above cause having been heretofore made upon the part of the appellants herein and papers having been duly submitted thereon and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is denied.

GANON KIMBALL
Deputy Clerk